Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Court Remand of Non-Accounting Safeguards Order	)	**CC Docket No. 96-149**
	)	

COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. submits these comments in response to the Commission's Public Notice released November 8, 2000.[1]

For the reasons set forth in the Verizon/Qwest appellate brief to which the Commission has referred (*see* Public Notice at 2), SBC submits that the terms of the 1996 Act, as the Commission correctly interpreted those terms in the 1997 *Universal Service Order*[2] and the 1998 *Report to Congress*,[3] plainly resolve the Commission's inquiry in this remand proceeding: when a Bell operating company provides "information services," it does not thereby provide "interLATA services" within the meaning of 47 U.S.C. § 271(a).

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[1] Public Notice, *Comments Requested in Connection With Court Remand of Non-Accounting Safeguards Order*, CC Docket No. 96-149, DA 00-2530 (rel. Nov. 8, 2000).

[2] Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997), *aff'd in part, rev'd and remanded in part, Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2212, 2237 (2000), *cert. granted*, 120 S. Ct. 2214 (2000), *cert. dismissed*, No. 99-1244, 2000 WL 1641148 (Nov. 2, 2000).

[3] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998).

As the Verizon/Qwest brief explained, Section 271(a) states that neither a Bell operating company nor its affiliate may "provide interLATA services" except as authorized in the remainder of section 271. The scope of that prohibition, however, is limited by the Act's express definition of "interLATA service": "[t]he term 'interLATA service' *means telecommunications*" between points in two different LATAs. 47 U.S.C. § 153(21) (emphasis added). The prohibition of section 271(a) applies, therefore, only when a Bell operating company or its affiliate "provides" "telecommunications."

Under the 1996 Act, "[t]he term 'telecommunications' means the *transmission*, between or among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received." *Id.* § 153(43) (emphasis added). Whereas "telecommunications" denotes transmission with *no* change in form or content, "information services" *do* involve a change in form or content: "[t]he term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*" *Id.* § 153(20) (emphasis added). Because an information service requires an alteration of the form or content of the transmitted information, it cannot qualify as "telecommunications."

In both the *Universal Service Order* and the *Report to Congress*, the Commission expressly confirmed this understanding of the Act's plain terms. In the Commission's words, "while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent," information service providers do "alter the format of information through computer processing applications such as protocol conversion and interaction with stored data." *Universal Service Order* ¶ 789. The Commission accordingly

rejected the notion that "information services are inherently telecommunications services because information services are offered via 'telecommunications.'" *Id.*

Likewise, the Commission told Congress that "'telecommunications' and 'information service' are mutually exclusive categories." *Report to Congress* ¶ 69 n.138. "[A]n entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not 'change . . . the form and content' of the information. When an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications,' it does not *provide* telecommunications; it is *using* telecommunications." *Id.* ¶ 41 (emphasis added). The Commission expressly rejected an argument that "Congress . . . intended that a service qualify as both 'telecommunications' and an 'information service.'" *Id.* ¶ 41 n.79. The Commission concluded that "[o]ur examination of the legislative history . . . convinces us that Congress intended the two categories to be mutually exclusive, and did not contemplate any such overlap." *Id.* (emphasis added). The Commission persuasively elaborated on these points:

> Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications." By contrast, when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications. Rather, it offers an "information service" even though it *uses* telecommunications to do so. We believe that this reading of the statute is most consistent with the 1996 Act's text, its legislative history, and its procompetitive, deregulatory goals.

Id. ¶ 39. In other words, the statutory definitions make clear that "an entity is *not* deemed to be providing 'telecommunications,' notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information." *Id.* ¶ 40.

These principles, driven by the clear statutory text, not only answer the ultimate question in this proceeding, but also respond to the specific questions in the Public Notice.

1. As the Commission correctly and repeatedly concluded in the *Universal Service Order* and the *Report to Congress*, though a provider of information services *uses* telecommunications, it cannot be understood to *provide* telecommunications and therefore cannot be said to provide "interLATA service" within the meaning of section 271(a). The Commission has noted that, where a provider of information services transports data over its own transmission facilities, "[o]ne could argue" that the provider "is furnishing raw transmission capacity to itself" — that is, providing "telecommunications" to itself. *Report to Congress* ¶ 69. But neither the statutory definition of "information service" nor the Commission's analysis in the *Report to Congress* appears to leave room for a distinction based on whether the provider of information services also owns the underlying transmission facilities. Even if the Commission were to entertain such a distinction, it should reiterate that an information-services provider does *not* provide telecommunications (and therefore cannot be providing "interLATA services") when it uses transmission capacity provided by an unrelated entity.

2. Even if some services included among the "incidental interLATA services" listed in section 271(g) could plausibly be understood to be information services, it does not follow that the category of "interLATA services" must include interLATA information services. One cannot rely on an indirect inference from a provision expressly *authorizing* specified conduct as a justification for overriding the expressly defined meaning of "interLATA services" and thereby expanding the scope of a provision *prohibiting* the conduct defined by that term. The only fair inference is that Congress included some extra, unnecessary assurance against any mistakenly expansive interpretation of the section 271(a) prohibition. "[A] belt-and-suspenders approach is not uncommon when the Legislative Branch cedes rulemaking power to the Executive Branch." *O'Connell v. Shalala*, 79 F.3d 170, 180 (1st Cir. 1996). In other words, Congress sought

preemptively to authorize services provided by a Bell operating company or its affiliate that might *arguably* be thought of as telecommunications in some contexts — that is, "to clarify what might be doubtful." *Shook v. District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998).

3. Even if the term "interLATA telecommunications services" in section 272(a)(2)(B) is read as a narrower subset of "interLATA services," the statute specifically defines "telecommunications services" separately from "telecommunications." "Telecommunications services" reaches only the provision of "telecommunications *for a fee directly to the public*" (47 U.S.C. § 153(46) (emphasis added)). As the Commission has already explained, the term is limited to "telecommunications provided on a common carrier basis." *See Universal Service Order* ¶ 785; *see also Report to Congress* ¶ 124. As the Verizon/Qwest brief explained, the most that can be inferred from section 272(a)(2)(B) is that "interLATA services" reaches more than *common-carrier* transmission services. Section 272(a)(2)(B) plainly *cannot* be read to imply that the term "interLATA services," contrary to its express definition, reaches more than "telecommunications."

4. In SBC's view, section 272(a)(2)(C), by its plain terms, requires a separate affiliate when a Bell operating company provides "interLATA information services."[4] That Congress treated "interLATA information services" differently from "interLATA telecommunications services" fortifies the statute's clear distinction between "telecommunications" and "information

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[4] This separate affiliate requirement has since expired. *See* Order, *Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, 15 FCC Rcd 3267 (2000) (declining to extend automatic sunset date of February 8, 2000 set by 47 U.S.C. § 272(f)(2)).

services." Significantly, whereas section 272(a)(2)(B) includes three separate references to provisions of section 271, section 272(a)(2)(C) makes no reference at all to section 271. And only subparagraph (B) speaks of "origination," a distinction that has special significance under section 271. The strong implication is that "interLATA telecommunications services" are subject to the prohibition in section 271, but that "interLATA information services" are not.

Similarly, section 272(f), which establishes the sunset dates of the various separate-affiliate requirements, further confirms that section 271 is limited to telecommunications and does not include information services. 47 U.S.C. § 272(f). By tying the sunset of the separate-affiliate requirement for "interLATA telecommunications services" to approval of a Bell operating company's application filed under section 271(d), *id.* § 272(f)(1), while separately tying the separate-affiliate requirement for "interLATA information services" to enactment of the 1996 Act, *id.* § 272(f)(2), Congress underscored its intent that section 271 has no application to "interLATA information services."

5. For the reasons expressed above, the Commission's analysis in the *Report to Congress* self-evidently supports — indeed, requires — the conclusion that information services fall outside the scope of "interLATA services."

In sum, the Commission should reconsider its erroneous ruling in the *Non-Accounting Safeguards Order*[5] that interLATA information services are "interLATA services" within the meaning of section 271(a). To vindicate Congress's intent, as expressed in the statute's plain language, the Commission should reaffirm its holding in the *Report to Congress* and should rule

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[5] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996).

that a Bell operating company may provide information services, including interLATA information services, without thereby providing interLATA services in violation of section 271.

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Respectfully submitted,

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